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In the Supreme Court of the United States

Office Supreme Court, U.S.
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CHARLES ELMORE CROPLEY
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OCTOBER TERM, 1948.

No. 649

LONGYEAR HOLDING COMPANY, a Corporation, HELEN H. BENNETT, C. M. HILL LUMBER COMPANY, a Corporation, THE ADAMS CORPORATION, a Corporation, HAROLD W. McCORMACK, JOHN ANDREW PETERSON, FANNIE E. DANIELS, ANNIE E. DANIELS, MINNIE DANIELS MANN, JENNIE D. CAMP, ANN R. HESS, WILLIAM R. DANIELS, LANCAS IRON COMPANY, a Corporation, THE NORTH STAR IRON COMPANY OF WEST VIRGINIA, a Corporation, SAGINAW LAND COMPANY, a Corporation, HELEN EMERSON JAMISON, FRANCES SELLWOOD LUSTER, R. M. SELLWOOD, JR., and JOSEPH GERALD SELLWOOD,

Appellants,

vs.

STATE OF MINNESOTA,

Appellee.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF MINNESOTA.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMIES THE APPEAL AND STATEMENT OPPOSING JURISDICTION OF THIS COURT.

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Appellants,

vs.

STATE OF MINNESOTA,

Appellee.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF MINNESOTA.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL AND STATEMENT OPPOSING JURISDICTION OF THIS COURT.

This is a case peculiarly suited to the jurisdiction of this Court. It is a case in which State statutes have been applied by a State court to appropriate to the State itself property rights of Appellants which stemmed from federal conveyances and vested in Appellants' predecessors under established law long before the passage of such State Statutes. The judgment gives direct effect to these statutes.

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The State relied on them throughout the case, and their constitutional validity was sustained. The questions involved are of great public importance. They embrace not only the large property values directly and indirectly in issue but also the integrity of established rules of property in Minnesota and the integrity and effectiveness of the basic protective provisions of our United States Constitution. The circumstances under which this case arose and the result reached have established precedents which, if permitted to stand uncorrected, open an almost unlimited field for legislative appropriation of private rights, property or civil, and the circumvention of all constitutional protections against such appropriations.

Appellee's brief does not even attempt to question the indisputable fact that the only alienable, proprietary rights and uses which the judgment finds to be in the State are those in the "iron ores and other minerals * * * with right to dispose of same by lease," which alone were appropriated to the State by the 1909 and 1917 statutes.* (Statement as to Jurisdiction, pp. 6 to 8; 34 to 37.) Appellee now admits that the constitutionality of such statutes has been properly and adequately raised in this case.

Such facts alone should settle this appeal.

They cannot be nullified by any failure of the State Supreme Court to fully discuss them in its opinion.

Nor can they be nullified by the implication in certain parts of that opinion that it was based on the common law. The common law made no such distinction between the ownership of "iron ores and other minerals" and of the other contents of land; and the District Court clearly based this distinction on the statutes which alone can support it. (Statement as to Jurisdiction, pp. 14 to 16 and 35 to 37.)

Neither does Appellee seriously question that the judgment in this case is in direct conflict with all previous

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* Minnesota Laws of 1909, Chapter 49, and Minnesota Laws of 1917, Chapter 110.

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decisions of the State Supreme Court on the subject, as discussed in our Statement as to Jurisdiction, pp. 21 to 28. Rather Appellee relies on certain unsupported implications to the contrary in the State Supreme Court's opinion and the asserted right of that court to change its established rules of property, under which Appellants' titles vested, if it does not say that it is basing the change on the 1909 and 1917 statutes.

As the soundness of this appeal is so clearly established by the judgment itself, and so fully discussed in Appellants' Statement as to Jurisdiction, this brief will be largely confined to specific comments on Appellee's Statement in Opposition to this Court's Jurisdiction. The titles and sub-titles used herein follow those used by Appellee.

APPELLEE'S "STATEMENT IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO THE JURISDICTION OF THIS COURT."

Appellee is correct in the statement here that this Court's jurisdiction is to be determined on the basis of the decision or judgment appealed from. That judgment in the Minnesota Supreme Court simply affirmed the judgment of the District Court. The substance and character of the judgment appealed from is thus established by the judgment of the District Court. The language used by the State Supreme Court in one of its opinions is not the judgment appealed from as most of Appellee's discussion would seek to imply.

Appellee is not correct in the statement that:

> "This Court has jurisdiction *only** if the decision and judgment of the Minnesota court *were based upon* statutes of the State of Minnesota * * *"

with its implication, later developed, that Appellee means, by the expression "were based upon," that the opinion and judgment of the State Supreme Court must state that they "were based upon" the statutes.

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* Emphasis supplied throughout except as otherwise noted.

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Even if this is intended to be confined to the appeal provision of Title 28, United States Code, Section 1257, (2), it is not correct. That provision contains no such implication. It reads:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Furthermore, while there would not seem to be the slightest question but that, under the form of the judgment, the pleadings and the facts in this case, this Court has appellate jurisdiction under the foregoing subsection, —such is not the only source of this Court's jurisdiction in this case. Section 2103 expressly provides that, if appropriate, our appeal papers shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to this Court at the time the appeal was taken.

Section 1257, (3), confers jurisdiction upon this Court for review by writ of certiorari,—

> "* * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * *, or where any title, right, * * *, is specially set up or claimed under the Constitution * * * or statutes of * * *, or authority exercised under, the United States."

It can hardly be questioned here that Appellants' titles have been specially set up or claimed under the Constitution and under the statutes of, and authority exercised under, the United States, both in the pleadings and briefs, as such titles are derived from conveyances from the United States. (Original record in court below, pp. 17-18 *et seq.*; 309-310.) See *United States v. Oregon*, 295 U. S. 1, at page 28, and cases there cited. This Court said in *Shively v. Bowlby*, 152 U. S. 1, at page 9:

> "The judgment against its validity (a grant from the United States and conveyance thereunder) proceeded

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upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this Court. Rev. Stat. § 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to the State courts. (Citing cases.)"

STATEMENT OF CASE.

Appellee characterizes as "not correct" the following statement of Appellants:

> "This case involves the ownership of the *alienable, proprietary,* beneficial rights and uses in some 33 acres of land in St. Louis County, Minnesota, which had formerly been the bed of a small shallow body of water known as 'Syracuse Lake'." (Statement as to Jurisdiction, p. 2.)

That this is a correct statement of the issues created by the pleadings is fully established by our Statement as to Jurisdiction and confirmed by Appellee's discussion later in its statement.

We admit that it is incorrect as applied to the issue on appeal from the judgment of the District Court. As we repeatedly pointed out in our Statement as to Jurisdiction, that issue involves ownership of the alienable, proprietary, beneficial rights and uses in *only "the iron ores and other minerals."* As to the lands generally and their other content, the judgment denied such proprietary rights to the State and declined to take them from Appellants. The only proprietary rights found to be in the State, and in issue here are thus the rights, and only the rights, which were sought to be appropriated to the State by the 1909 and 1917 statutes here in question. (See Statement as to Jurisdiction, pp. 6 to 8 and 34 to 37.)

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Here also is the erroneous assertion by Appellee that the facts as well as the issues are to be determined from the language of the Minnesota Supreme Court's opinion rather than from the record and the affirmed judgment and findings here appealed from.

STATUTES OF THE STATE CLAIMED TO BE INVOLVED.

The mere assertion by Appellee that the decision is based on the common law and not upon the statutes cited, cannot, any more than can the similar implication in certain of the language used in the State Supreme Court's opinion, determine the jurisdictional questions. (See authorities, Statement as to Jurisdiction, pp. 33 to 34.) In *Terre Haute & Indianapolis R. R. v. Indiana*, 194 U. S. 579, at page 589, Mr. Justice Holmes states:

> "* * * We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court."

Certainly this case would never have been brought except for the passage of the flagrantly unconstitutional statutes here in question.

The well settled principle that this Court will itself determine the existence of rights under the Constitution, and the effect thereon of legislation or other action claimed to impair such rights was applied to the question of ownership of land under navigable waters in *Appleby v. City of New York*, 271 U. S. 364, where Mr. Chief Justice Taft said at page 380:

> "In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State

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> and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the state, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made; *but we must give our own judgment derived from such sources and not accept the present conclusion of the state court without inquiry.*"

and at page 391:

> "If we are right in our conclusion as to the effect of these deeds under the law of New York at the time of their execution, then there can be no doubt that the laws of 1857 and 1871 as enforced in this case impair the contract made by the city with the grantees of these deeds."

Certainly, also, if, as now asserted by Appellee, the judgment had actually been based upon the ownership by the State "under the common law" of the alienable, proprietary, beneficial rights and uses, the judgment would not have been confined to the "iron ores and other minerals" and the "right to dispose of same by lease."

The common law never made any such distinction. Only the statutes here in question make such distinction.

RAISING THE FEDERAL QUESTIONS AND RULINGS THEREON BY THE COURTS BELOW.

1. The admission here that the federal questions have been sufficiently raised should, when coupled with the inherent nature of the judgment appealed from and its necessary relationship to the statutes involved, finally settle this appeal. The effort of counsel for the State, as well as that indicated by some parts of the State Supreme Court's opinion, to avoid the constitutional issue only serve to emphasize Appellants' need of the constitutional protections here invoked.

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2. It is here asserted that the Complaint is an ordinary one and "there is nothing in the original Complaint to indicate that its claim is based upon those statutes." This is not correct. The Complaint, in both its allegations and prayer, asserts claim to the *"iron ores and other minerals"* in the exact language of the statutes here in issue except for the necessary changes to apply the statutory language to the specific lands claimed.

For the convenience of this Court, the following comparison is given:

Complaint	1909 Statute
The Complaint asserts ownership of	"That
"all iron ores and other minerals on, in or under said lands	*all iron ores and other minerals on, in or under* the *lands* within this state which lie beneath the waters of meandered public lakes and rivers belong to the state,
together with the right to enter upon said lands and explore for and mine and remove such iron ore and other minerals, and has, and ever since the organization of the State of Minnesota	*together with the right to enter upon such lands and explore for and mine and remove such iron ore and other minerals, and* that the state now *has, and since its organization*
has had, the right to sell, lease, or otherwise use or dispose of such lands and such iron ores or other minerals • • •."	*has had, the right to sell, lease, or otherwise use or dispose of such* mineral *lands and such iron ores and other minerals* • • •."

It will be noted that the identity of language extends even to the use of the word "ore" in singular form in one particular place and in the plural form in all other places.

As emphasized heretofore and in our Statement as to Jurisdiction, the judgment of the District Court, affirmed by the State Supreme Court, similarly follows the language of the statute. (Second record in court below, page 52, Statement as to Jurisdiction, pp. 34 to 37.)

3. The bare reiteration here that the District Court's decision was "based upon the common law" and not

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upon the statutes is refuted by not only the inherent provisions of the judgment itself but also many passages in the opinion of the District Court. (See Statement as to Jurisdiction, pp. 14 to 16 and 34 to 37.)

4. Contrast the statement of Appellee here, that the riparian owner's rights involved only "the matter of accretions and relictions, which are wholly a matter of state control," with the repeated assertion in almost every decision of the State Supreme Court (other than in this case) and down to the present day, that the rights of the riparian owners "are vested property rights which cannot be taken away even by the state for public use, without compensation." (See Minnesota cases referred to in Statement as to Jurisdiction, pp. 22 to 25.)

5. Appellee's effort here to establish by quotations from the State Supreme Court's opinion that the judgment here appealed from did not draw into question the 1909 and 1917 statutes wholly ignores, as heretofore pointed out, the inherent nature of that judgment which cannot be controlled or changed by such language. (*Supra*, pp. 5 to 7 and Statement as to Jurisdiction, pp. 33 to 34.)

There is not, as heretofore pointed out, the slightest basis (and none is even suggested) for a "construction of the common law" which places in the State the alienable, proprietary rights and uses in *only the "iron ores and other minerals"* while denying to the State such rights and uses in the other contents of the land. *No such distinction ever existed at common law. It is made only by the 1909 statute.*

The judgment here appealed from characterized the State's rights generally as held "*in its sovereign, governmental capacity, for common public use* and in trust for the people of the state *for the public purpose for which it is adapted, but not in absolute proprietorship with right of alienation* * * *." (Second record in court below, page

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52.) This is the limitation which, except for this case, the Minnesota courts have always applied to all rights of the State in these lake bed lands. It is departed from in this case only, and *only with respect to "the iron ores and other minerals."* With respect to these "iron ores and other minerals," the judgment attempts to vest in the State the *proprietary right* to use them and dispose of them by lease. This accords only with the 1909 and 1917 statutes. It does not accord with any known or suggested distinction in the common law.

We believe that the State Supreme Court was wholly mistaken in those parts of its opinion here quoted to the effect that, because the State had sovereignty over the navigable waters of the State and their beds from the date of its organization, riparian owners could enjoy rights in such beds only through formal grant from the state legislature. This Court has consistently reiterated the basic principle specifically applied to Minnesota in *St. Anthony Falls Water Power Co. v. Board*, 168 U. S. 349, 358, that the rights of riparian owners in that State "are to be measured by the rules and decisions of the state courts in Minnesota." It has also confirmed, as recently as in the California Tide-Lands case, that the mere existence of sovereignty or governmental rights in a state does not carry proprietary rights. (See Statement as to Jurisdiction, pp. 46 to 47 and 45 to 46.) A state also has sovereignty over its land areas. The extent of that sovereignty is to be found in the common law as defined and applied by the courts with such statutory modifications as do not unconstitutionally impinge upon vested rights.

While the State Supreme Court may be technically correct in the language here quoted from its opinion to the effect that the state legislature had made no *"grant* vesting these shore owners with any interest in the portion of the lake bed involved," it is wholly incorrect in the inference that the state legislature had not fully recognized

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(except for the 1909 and related statutes) the ownership by riparian owners of all alienable, proprietary and beneficial rights in the lake beds in accordance with the State Supreme Court's repeated construction of the common law and of full title whenever such beds were properly freed of the burden of the public waters through either authorized artificial drainage or loss of navigability from natural causes. (Statement as to Jurisdiction, p. 27 to 28 and Appendix A thereto.)

The mere assertion by counsel for Appellee, like similar inferences in the State Court's opinion, cannot change the fact that under the law in Minnesota as announced by all decisions of its Supreme Court, except in this case, the conveyances to Appellants and their predecessors in interest duly vested in them the alienable, proprietary and beneficial rights and uses in and to the iron ores and other minerals in the lands here in question as well as in and to the other contents thereof, and Appellants were left free to fully exercise such rights when the waters were duly removed under authority of both the state and federal governments. (Statement as to Jurisdiction, pp. 22 to 26 and 27 to 28.) Appellee does not really seriously attempt to claim the contrary.

6. The real basis upon which the State as Appellee seeks in this motion, and has sought through this case, to deprive Appellants of the benefit of their constitutional guaranties, is made clear here and in subsequent sections by the assertion of the right of the state court to change its definition of the common law property rights in Minnesota "iron ores and other minerals" as long as in doing so it does not admit that its action is based upon the 1909 and related statutes.

As heretofore discussed, the principle advanced by Appellee is subject to the uncontroverted modifying principle established by the decisions of this Court that this Court will make its own examination of the law in Minnesota, its

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own determination of property rights vested under it, and its own determination as to whether or not, in the court's denial of such property rights, the constitutional validity of the 1909 and 1917 statutes has been "drawn in question" by the judgment appealed from.

Furthermore, we know of no case in which it has yet been held by this Court that the courts of a state may, with constitutional immunity, by a change in its common law definitions of property rights, appropriate *to the state itself* property rights which have theretofore clearly vested through conveyances and the established law as theretofore set out by the decisions of the courts of such state.

For example: Minnesota also had sovereignty over the land areas within that State from the time of its organization. Under the decisions of its courts, conveyances of such areas by the United States and others, when in proper form, carry so-called fee title. Such fee title is of course, however, subject to the sovereign rights of the State. If the State should today assert ownership of the "iron ores and other minerals" in and under such land areas, and that it "has, and ever since the organization of the state has had, the right to sell, lease or otherwise use or dispose of such iron ores or other minerals" as a common law incident to its sovereign rights over such land areas, and if the State Supreme Court should sustain such contention and announce that such had always been the common law of the State of Minnesota, would the private owners of such "iron ores and other minerals," be without the protective jusisdiction of this Court? We do not believe that this would be so even if such result were attempted by the State without the enactment by its legislature of any confiscating statute to which certain of such constitutional provisions could be specifically applied.

Certainly there would be no doubt whatsoever if the land owners had acquired their titles, as did the Appellants in this case, by conveyances from the United States,

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since the rights or titles involved would have been "specially set up or claimed under the Constitution * * * or statutes of * * * or authority exercised under, the United States." (See *supra*, pp. 4-5.)

Viewing our basic question here from another aspect: If the 1909 and 1917 statutes had not been passed by the state legislature, no State official would have presumed to start this action. The analysis of the Complaint in this case given above clearly shows that this action was filed only because of, and in support of, the 1909 and 1917 confiscatory statutes. True, there was added in the Complaint the claim of full fee title to the other contents of the land as well as to the "iron ores and other minerals," and that claim cannot be said to be supported by the 1909 and 1917 statutes. But that claim was rejected by the court below. Its mere unsustained insertion in the Complaint should not now be availed of to deprive Appellants of their constitutional protections.

7. We do not agree that it must "appear affirmatively" from the State Supreme Court's opinion that the federal question was necessary to the determination of this case. The cases cited by Appellee do not so hold. This Court has repeatedly held, as heretofore emphasized, that it will make its own determination of such matters. (See Statement as to Jurisdiction, pp. 33 to 34, and *supra*, pp. 6-7.)

That the constitutional validity of the 1909 and 1917 statutes has been drawn in question in this case is admitted. That their constitutional validity was sustained, and that they and the federal questions involved in them were essential to the judgment here appealed from, are fully established by the substance of the judgment itself and the opinions of the District Court which rendered it.

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STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THAT THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

Here is a reiteration of the claim that the Minnesota Court can, with constitutional impunity, overrule all of its prior decisions, even though by so doing it appropriates to the State the principal elements of value in Appellants' property, so long as it does not formally base its action on the 1909 and 1917 statutes.

As heretofore pointed out:

(a) The judgment here appealed from directly followed the statutes;

(b) The District Court clearly based its findings on the statutes;

(c) The effort in the State Supreme Court's opinion to make it appear that it was only asserting general common law rules and not giving effect to the statutes is clearly inconsistent with the inherent nature of the judgment itself and is not supported by any common law distinction between the ownership of "iron ores and other minerals," and of other contents of land;

(d) This Court will settle these questions for itself.

We have difficulty in understanding what could have prompted counsel for the State to here make the flat assertion that no Minnesota case holds that a riparian owner "has any alienable or proprietary right in the bed of a navigable lake below low-water mark, or any beneficial rights or uses beyond the ordinary riparian rights * * *," such as exist at common law even on tide water. Every decision of the Minnesota Supreme Court, except in this case, is to the contrary. (Statement as to Jurisdiction, pp. 22 to 28.)

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Some of the cases do mention wharfage, dockage rights and rights of accretion and reliction but they go on also to confine the State's rights to only inalienable, governmental rights for protection of the public use of the waters for the purposes for which they are adapted, and place all other rights in the riparian owners. Only the *jus publicum* is in the state. All of the *jus privatum* is in the lot owner. As early as the case of *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222, the Minnesota Supreme Court, in discussing the reciprocal completeness of the State's governmental right on the one hand and the private rights of the lot owner on the other, used the following language to be found again in various later cases:

> "The limit to the *private* right is imposed by the *public* right, and the *private* right exists up to the point beyond which it would be inconsistent with the *public* right."

The distinction is illustrated in *Lamprey v. State*, 52 Minn. 181, where it is stated at page 202:

> "• • • *We have repudiated the doctrine that the state has any private or proprietary right* (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use."

In *Union Depot v. Brunswick*, 31 Minn. 297, at page 302:

> "Whether the fee in this 'made land' would be in the state or in the riparian owner—that is, whether it partakes of the nature of the bed of the stream upon which it is made, or of the shore to which it is added—may be a question of speculative interest, but it is not one of any practical importance. If the fee be in the riparian owner, yet, of course, it must be a qualified fee; that is, subject to the paramount right of public navigation. *But if it be in the state, the riparian owner still has, subject to this same public right, the exclu-*

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sive right of possession and the entire beneficial interest."

In *Miller v. Mendenhall*, 43 Minn. 95, at page 96:

"• • • While the *public* right of navigation and fishery may not be extinguished until the waters are excluded, yet *after the submerged land is filled or occupied* the riparian owner will have the *exclusive right of possession, and the entire beneficial interests*; and whether this dominion would be absolute and his title indefeasible as against the state, is not necessary to inquire."

Furthermore, the numerous decisions involving lake-bed lands which had been relieved from the burden of the governmental rights by either natural causes or the authorized drainage or diversion of the navigable waters did not, of course, turn on such wharfage, dockage and incidental rights. In those decisions the sometimes confusing conflict between the governmental rights of the State and the private rights of the lot owners is eliminated and the decision that all alienable and proprietary rights are vested in the lot owners stands clear-cut and indisputable. These decisions are, of course, controlling here where, before this case was started, the public waters had been diverted with the State's governmental approval and its governmental rights had shifted with them to their new bed and channel which had been duly dedicated for public use.

Most of the actual decisions or holdings of the various Minnesota cases here discussed by Appellee are accurately covered in Appellants' Statement as to Jurisdiction at pages 27 to 28. Our statement as to what they *hold*, what they are a precedent for, does not seem to be questioned by Appellee. Its selection of isolated quotations from them is more confusing than helpful. These quotations should be read only in their context. The comments on certain of these cases taken from the opinion of the State Supreme Court in this case are also not consistent

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with their holdings, as pointed out in Appellants' Statement as to Jurisdiction. (See particularly Appendix B thereto.)

In this connection this Court is particularly urged to consider the sound review of the Minnesota decisions made by Judge Morris in *Hobart v. Hall*, 174 Federal 433 (affirmed 186 Fed. 426), and its own conclusion as to the Minnesota rule set forth in *U. S. v. Holt State Bank*, 270 U. S. 49, 59.

Appellee's quotation from this Court's decision in the *Schurmeier* case, 7 Wall. 272, 287, is immediately followed in the text by the following:

> "Grants of land bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway.
>
> "The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the centre of it, and he consequently holds that the fee passed to that extent. *Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country.*"

The Minnesota courts early adopted the English common law on this and other subjects generally. *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 59 (1865); *State v. Pulle*, 12 Minn. 164 (1866); *Blackman v. Wheaton*, 13 Minn. 33 (1868).

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This Court's opinion in the *Schurmeier* case was largely devoted to a discussion of the old federal statutes with reference to surveys, boundaries, meander lines, etc., rather than the principles here involved which determine the rights of riparian owners in the beds of navigable waters after they had been freed of the public burdens of such waters, so that there was for a year or two afterwards some confusion as to this Court's views. But such confusion was promptly dissipated. This Court had in the *Schurmeier* case specifically affirmed the title of the lot owners to the area in the bed of the Mississippi River which had been freed of the burden of the public waters by fill, and did specifically hold that the boundary of the lot owners on navigable waters *is such waters and not any meander line*,—the meander line being only a convenience for measuring acreage in connection with sales of the lots under the federal statutes.

In *St. Paul S. & T. F. R. Co. v. First Division, etc. R. Co.*, 26 Minn. 31, next cited by Appellee, the court commented on the *Schurmeier* case in the following language:

> "This Court, in *Schurmeier v. St. Paul & Pacific R. Co.*, 10 Minn. 59 (82), decided that the meander lines of governmental subdivisions, bordering on navigable rivers, do not limit the grant in a patent; and this decision was affirmed by the Supreme Court of the United States in the same case, *Railroad Co. v. Schurmeier*, 7 Wall. 272. The question is therefore set at rest. *In the same case, this Court held that the common-law rule as to construction of grants of land bordering on streams is in force in this state, and is applicable to patents or grants of the public lands by the general government.* But patents and grants by the general government may be controlled in this respect, as in others, by the acts of congress regulating the survey and sale of public lands."

Morrill v. St. Anthony Water Falls Power Co., 26 Minn. 222, involved the use of the waters, not title to the

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river bed, but the court approved the rule above quoted from *St. Paul S. & T. F. R. Co. v. First Division, etc., R. Co., supra.*

The attempt of Appellee to distinguish the case of *Miller v. Mendenhall,* 43 Minn. 95, and the associated Duluth Harbor cases on the ground that by fixing the harbor line at the point of navigability "the state had actually made a grant to the riparian owners" of the bed between that line and the shore, is most interesting.

Such decisions did not so hold but only held that the fixing of such a line was an invitation to the shore owners to freely exercise the rights which they already had, because it relieved such rights from certain obligations of the paramount government right to control navigation.

The holdings in these cases were discussed at length by the State Supreme Court in 1942 in its decision in *Nelson v. Delong,* 213 Minn. 425. See particularly its discussion starting at page 432 and its quotation with approval from Justice Mitchell's opinion in *Bradshaw v. Duluth Imperial Mill Co.,* 52 Minn. 64, where it was stated:

> "• • • *But the establishment of a dock line neither creates nor destroys rights, but merely regulates and limits the exercise of existing rights. Plaintiff's rights of property in the lots in question were not divested by either the location or change of location of the dock line.*• So long as the old line remained in force, of course he could not use the lots for any purpose inconsistent with the right of navigation in the waters over them. But when the line was changed, this limitation was removed, and the establishment of the new line was authority, as well as an invitation to him from the state, to fill and build out to that line, or so far in that direction as his property extended."

Even if, however, Appellee's contention be accepted, that the fixing of a harbor line constituted "a grant from the legislature to the lot owner," it could hardly be said

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• Emphasis supplied by Minnesota Supreme Court.

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that the fixing of the harbor line in these Duluth cases constituted more of a grant to the shore owner by the State than had occurred in connection with the lands involved in this appeal where the State had authorized and carried out *the complete removal and diversion of the waters.*

Appellee's effort to distinguish *Union Depot, etc., Co. v. Brunswick,* 31 Minn. 297, on the basis that it involved water bed land on which "made land" had been placed, is also most interesting, as applied to our case.

We can see no possible valid distinction between a situation where the State, acting in its governmental capacity, properly permits the navigable waters to be removed from the land by dumping material on the bed and one where it permits the complete removal of the waters by a duly authorized diversion of them to a new channel dedicated to public use. If any such distinction can be said to exist, it should be noted that prior to the commencement of this case, and with due State authorization, not only had the waters been fully diverted but also a part of the bed of Syracuse Lake had been filled by stripping dumps and other parts had been deeply excavated.

The actual result of all of the State decisions is, of course, that when in the due exercise of the governmental rights of the State, or through natural causes, the lands have been freed of the burden of the governmental rights and trust for the protection of the public use of the waters for the purpose for which they are adapted, the lot owner is left free to fully enjoy his alienable, proprietary, beneficial rights and uses.

Appellants' quotations from *Petraborg v. Zontelli,* 217 Minn. 536, and *Carpenter v. Board of Commissioners,* 56 Minn. 515, are from cases which involved respectively an injunction against, and damages for, an interference with waters without the consent of the riparian owners. The discussion is thus naturally of the rights in the waters rather than in the beds.

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Appellee's citation of *State v. St. Paul and Duluth R. Co.*, 81 Minn. 422 (1900) is of particular interest as recording that the State and local governmental units tax the submerged lands under navigable waters,—to the lot owners if they have not been separated by conveyance from him, and otherwise to the holder thereof by deed. The State Supreme Court said at page 424:

> "Riparian rights, though recognized by the law of this state as property rights subject to sale and transfer by the owner of the adjoining or shore property, are, until separated and disassociated therefrom by some act of such owner, an incident to and part of the abutting shore property, having no separate and independent existence. *For all purposes*, taxing and otherwise, *the shore property and the submerged land constitute but one tract or parcel of land*; and, as the abutting shore property is the superior or paramount estate, *the submerged land* and all riparian rights are necessarily included therein, and inseparable therefrom, except by some act of the owner indicating an intention to sever them.
>
> "Counsel for the state does not controvert this proposition, and he concedes that if the shore property was owned by an individual, *a tax thereon would include and cover all riparian rights.* But he contends that, as the shore property is exempt from taxation because used for railroad purposes, and *as the submerged land is not used in connection therewith, or for any purposes whatever, it is taxable as other real property owned by railroad companies* which is not used for railroad purposes. This contention is based on the theory that, inasmuch as the owner of the shore estate may sever and separate therefrom the submerged land and riparian rights incident thereto, and sell and dispose of the same to one having no interest in the shore property, such submerged land is severable without the consent of or action by the shore owner, and was properly platted by the county auditor as separate and independent property."

Appellee's statement that in no decision of the Minnesota court, except in *State v. Korrer*, 127 Minn. 60, "has

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there been directly involved the question of rights of the state in the beds of its navigable waters, and in no other case has the state been a party," is not correct. Such question was involved in, and the State was a party to, *State v. St. Paul & Duluth R. Co.*, 81 Minn. 422, discussed hereinbefore. The State's rights were also directly involved in *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297. There the State by special act of its legislature had granted to the Depot Company "all of the rights belonging to the State of Minnesota to and in the soil under said Lake St. Croix so to be occupied by said railroad bed and structures * * *." Such a grant was held by the court to be without effect *because the State had no alienable, proprietary rights to grant.*

The State was also a direct party to *Lamprey v. State*, 52 Minn. 181, in which riparian owners on a navigable lake brought an action, after the lake had dried up, asking that the State, as a defendant, be declared to have no title or interest in the dried up lake bed. The decision was in favor of plaintiffs, the court stating at page 200:

> "When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, *and their former beds*, under the principles already announced, *would become the private property of the riparian owners.*"

The State's rights were also directly involved in *Hobart v. Hall*, 174 Fed. 433 (affirmed 186 Fed. 426), which dealt with the question of title to an island which had formed in the Mississippi River between a lot owned by plaintiff on the east bank of the river and the middle or thread of the stream. The island (an acre and one half in extent) had been formed after plaintiff's predecessor had received title to his lot. Defendants claimed title through a deed given by the State of Minnesota. It was held that plaintiff was "the beneficial owner and entitled to the im-

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mediate and exclusive possession and use" of all of that part of the island between his lot and the thread of the stream, subject only to any sovereign or governmental rights of the State, "for the purpose of protecting, preserving and improving the public right of navigation on said river."

Furthermore, while the State has not been a party to the many other decisions, it has recognized their import and effect in its drainage ditch and other legislation (See Appendix A to Statement as to Jurisdiction) and, throughout the ninety odd years of its existence, has attempted to question such holdings only through the *Korrer* case which was brought after the 1909 statute and decided against the State in 1914, and finally in this case brought after the legislature had continued its effort to appropriate the lake-bed "iron ores and other minerals" to the State by the passage of the 1917 and subsequent leasing statutes.

Finally, the State claims that Appellants are not unconstitutionally deprived of their property, and no federal question is presented, because several Minnesota cases held that leasing of ore in state lands was not a sale of the lands themselves. No serious claim is made that a state lease of the "iron ores and other minerals" in land is not an alienation of such "iron ores and other minerals," and the judgment which is the subject of this appeal expressly found with respect to the "iron ores and other minerals," that the State could "*dispose* of same by lease." (Second record in court below, page 52). But in any case, the issue can no more be avoided by a finding that the leasing of the right to mine and remove the "iron ores and other minerals" is not a State alienation of private rights than could the issues as to the federal questions be avoided by a declaration or finding that non-navigable waters were navigable. *United States v. Oregon,* 295 U. S. 1, 29; *Oklahoma v. Texas,* 258 U. S. 574; *United States v. Utah,* 283 U. S. 64, 75; *United States v. Holt State Bank,* 270 U. S. 49, 55, 56.

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While it must be admitted that there have been tendencies in certain parts of this country toward the adoption of foreign ideologies, particularly as applied to the ownership of minerals and similar natural resources in which the majority of the public does not participate, such tendencies are being increasingly repudiated with a rising understanding and analysis of the soundness of our institutions. The constitutional provisions here invoked by Appellants were carefully designed to prevent inroads on private rights by government, whether royal or democractic. As long as they remain in the Constitution, the recognized procedures for their application and determination by this Court should be sought by the State, not avoided.

We respectfully submit that the State's motion for the dismissal of this appeal should be denied.

Respectfully submitted,

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